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No. 84-1210

In the Supreme Court of the United States

OCTOBER TERM, 1984

GAY SPRADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the failure of the district court to inform counsel of a communication between the judge and jury during deliberation of the jury constituted reversible error.

2. Whether the use of testimony of five co-conspirators who had entered into plea agreements with the government deprived petitioner of due process of law.

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OPINION BELOW

The decision of the court of appeals (Pet. App. A1-A3) is reported at 747 F.2d 1466 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1984. A petition for rehearing was denied on November 29, 1984 (Pet. App. A16-A17). The petition for a writ of certiorari was filed on January 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of one count of conspiring to import marijuana, in violation of 21 U.S.C. 952(a), 960, and 963, two counts of importing marijuana, in violation of 21 U.S.C. 952(a) and 960 and 18

U.S.C. 2, one count of conspiring to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846, and two counts of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. She was sentenced to concurrent five-year terms of imprisonment on five counts, to be followed by a special parole term of three years, and to four years' probation on the remaining count, to commence following her release from confinement. Petitioner was also fined $5,000. The court of appeals affirmed (Pet. App. A1-A3).

1. The evidence at trial established that petitioner, together with six other persons, imported and distributed marijuana on two occasions during 1981 and 1982.[1] The first marijuana importation, of between 500 and 700 pounds, occurred in November 1981 and involved the use of an airplane recently purchased by certain of the co-conspirators. Petitioner's co-conspirators testified that petitioner aided in the enterprise by selecting landing sites and later serving as a lookout when the marijuana arrived (Pet. 4; see, *e.g.*, VIII R. 29-30, 37). She performed similar functions in connection with the second importation, which occurred in February 1982 and again consisted of approximately 700 pounds (Pet. 4-5; see VIII R. 43-46).[2]

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[1]Petitioner was named in a six count indictment together with John King, Benjamin Holmes Morris, and her former husband Joseph Spradley (Pet. App. A4-A7). At the time of petitioner's trial, Joseph Spradley remained at large. William Reed and Monte Koon, arrested some months before petitioner while attempting to import marijuana in a sailboat, later disclosed their involvement in the transactions in which petitioner was involved. Larry Jacobs, the seventh member of the conspiracy, waived indictment and pled guilty to an information before petitioner went to trial (VIII R. 200).

[2]While all five co-conspirators who testified at petitioner's trial agreed that she had participated in both importation schemes, Morris recalled that the first marijuana shipment arrived approximately one week later than the other witnesses testified that it arrived. Similarly, he recalled

The government's case at trial depended largely on the testimony of five of petitioner's six confederates, each of whom entered into plea agreements under which they would plead guilty to a single count and testify truthfully at petitioner's trial. The government, in turn, agreed to recommend certain maximum sentences with respect to each individual. King and Morris both pleaded guilty to one count of conspiracy to import marijuana (II R. 332-333), carrying a maximum penalty of five years' imprisonment. King also pleaded guilty to a charge in a separate prosecution in a different judicial district, carrying a 15 year maximum term of imprisonment (VIII R. 100-102, 105). Jacobs pleaded guilty to a single count of conspiracy to import, and the government agreed to recommend that he be sentenced to no more than three years' imprisonment (*id.* at 200). Reed and Koon pleaded guilty to single counts of possession and the government initially agreed to recommend seven year sentences (*id.* at 59-60, 149-150). After Koon assisted the government in an unrelated investigation as a confidential informant, however, the government agreed to reduce its recommendation as to him alone to no more than five years' imprisonment (*id.* at 125-126, 149, 152; IX R. 7). While requiring each individual to offer exclusively "truthful testimony" at petitioner's trial, none of the plea agreements contained any other contingency. See GX 8; DX 2-5. The jury was informed of the agreements and warned to receive the witnesses' testimony with caution (IX R. 138-139).

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that the second shipment arrived some weeks before the time the other witnesses testified that it arrived (IX R. 23-25, 31). Reed and Koon also testified about a third importation scheme that was not charged in petitioner's indictment, although they failed to agree on the details surrounding this third transaction (VIII R. 4, 76-78).

2. Petitioner's trial lasted two days. At 2:55 p.m. on the second day, the jury retired to deliberate. At approximately 5:00 p.m. that afternoon, the jury informed the court that it was deadlocked. After summoning counsel, informing them of the jury note, and soliciting their suggestions (IX R. 152-155), the court indicated that it intended to deliver an *Allen* charge to the jury and encourage the jurors to continue their deliberations (Pet. App. A9). Both counsel examined the court's proposed instruction; neither objected to its content and the court thereafter charged the jury (IX R. 155-157; Pet. App. A10-A11).

Approximately one hour later, the jury again communicated with the court. This time, the jury asked that testimony be read "regarding the second plane load of marijuana, specifically what was the testimony concerning [petitioner's] involvement at the landing site, at the stash house and thereafter" (Pet. App. A12). Without summoning counsel or informing them of the jury's note, the court advised the jury "that we have no transcripts available of the testimony and you will have to follow your own recollection" (*ibid*). Forty minutes later, the jury advised the court that it had reached a verdict. Counsel were summoned. At that juncture, the court informed counsel that it had received and responded ex parte to the jury's request. Neither counsel objected to the district court's action (*id.* at A12-A13). The jury's verdict was then announced.

3. On appeal, petitioner objected for the first time to the district court's action in responding to the jury's note, contending that it violated Fed. R. Crim. P. 43(a) and necessitated reversal of her conviction. The court of appeals affirmed (Pet. App. A1-A3). While noting (Pet. App. A2) that "trial judges should always confer with counsel concerning communications with a jury during deliberations," the court added that "failure to follow such procedures is not an automatic *per se* ground for reversal." In so holding,

the court of appeals relied upon *United States* v. *Zielie*, 734 F.2d 1447 (11th Cir. 1984), cert. denied, No. 84-482 (Jan. 21, 1985) where, as in the instant case, the district court had responded ex parte to a jury request —there for "a copy of the [trial] transcript" — by informing the jury that no such transcript had yet been prepared and that the jury "must follow [its] collective recollection of the evidence" (734 F.2d at 1460). Holding that the trial court's action violated Rule 43(a), the *Zielie* court nevertheless concluded that such error was harmless as appellant had failed to demonstrate prejudice. Likewise, the court of appeals here concluded that "[u]nder the facts of this case, we find no reversible error" (Pet. App. A2).

The court of appeals also held that the government's reliance upon the testimony of the five co-conspirators following their entry into plea agreements with the government did not violate due process (Pet. App. A3). Petitioner had relied upon *United States* v. *Waterman*, 732 F.2d 1527 (8th Cir. 1984), in contending that the use of such witnesses violated her right to due process. In *Waterman*, a panel of the Eighth Circuit had concluded that a government promise to recommend leniency for certain prosecution witnesses contingent upon their testimony aiding in defendant's indictment constituted an "invitation to perjury" and thus infringed defendant's right to due process (732 F.2d at 1531). Noting both that the panel's decision in *Waterman* was subsequently vacated and the case set for rehearing en banc[3] and that, in any event, the instant case was factually distinguishable, the court of appeals rejected petitioner's due process claim and affirmed her conviction. "The panel opinion [in *Waterman*] condemns the use of a witness who has entered into an agreement with the government based

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[3]The en banc Eighth Circuit, by an equally divided vote, subsequently affirmed the judgment of conviction in *Waterman* (732 F.2d 1533). A petition for a writ of certiorari is pending in *Waterman* (No. 84-1235).

upon the results of his or her testimony. Without commenting on the opinion, we find no factual support in the record for the argument being made" (Pet. App. A3).

ARGUMENT

1. Petitioner contends (Pet. 8-13) that the district court's failure during jury deliberations to inform her of a jury request to have certain testimony repeated violated her rights under Fed. R. Crim. P. 43(a) and the Due Process Clause and necessitates reversal of her conviction. The court of appeals, however, correctly found (Pet. App. A2) no reversible error in the district court's action. The sole issue is whether petitioner was prejudiced by the trial court's failure to inform her of the exchange with the jury.

Fed. R. Crim. P. 43(a) guarantees to a defendant in a criminal trial the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." In *Rogers* v. *United States*, 422 U.S. 35 (1975), this Court held that this rule requires that jury inquiries during deliberations be "answered in open court" and that defense counsel be afforded "an opportunity to be heard before the trial judge respond[s]" (*id.* at 39). Nevertheless, the Court indicated that not every district court failure to comply with Rule 43 necessitates reversal, observing that such violations "may in some circumstances be harmless error" (*id.* at 40). See also *Rushen* v. *Spain*, 464 U.S. 114 (1983), cert. denied, 464 U.S. 917 (1983); *United States* v. *Yonn*, 702 F.2d 1341, 1344-1345 (11th Cir. 1983); *United States* v. *Dominguez*, 615 F.2d 1093, 1094-1096 (5th Cir. 1980); *United States* v. *Bufalino*, 576 F.2d 446, 451 (2d Cir.), cert. denied, 439 U.S. 928 (1978). Here, although the district court failed on one occasion to comply with Rule 43(a), the error did not prejudice petitioner's "opportunity to defend against the charge." *United States* v. *Gagnon*, No. 84-690 (Mar. 18, 1985), slip op. 5; see *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934).

Petitioner does not dispute that a Rule 43 violation is not reversible error unless it prejudices the defendant's right to a fair trial. Rather, petitioner contends that "[u]nder the unique circumstances of this case" (Pet. 9) the court of appeals erred in concluding that the violation was not reversible error. Application of well-settled principles of determining prejudice to the concededly "unique circumstances of this case" is obviously not a matter warranting this Court's review. But in any event, the court of appeals was correct in its disposition of the matter.

The jury requested that testimony be repeated concerning one of two transactions about which five prosecution witnesses testified over the course of one and one-half days. The grant or denial of such a request is within the broad discretion of the district court. *United States* v. *Zarintash,* 736 F.2d 66, 69-70 (3d Cir. 1984); *United States* v. *Lopez,* 728 F.2d 1359, 1363 (11th Cir. 1984), cert. denied, No. 83-1983 (Oct. 1, 1984); *United States* v. *Birges,* 723 F.2d 666, 671 (9th Cir. 1984), cert. denied, No. 83-6398 (Apr. 16, 1984). As the court of appeals noted (Pet. App. A2), the most common — and permissible — response of trial judges to such a request is to "advise the jury to rely upon its own recollection of the testimony."[4] The exercise of discretion was particularly understandable and appropriate here, since at the time the jury made its request, the court reporter had not yet transcribed the trial testimony (Pet. App. A12). See *United States* v. *Lopez,* 728 F.2d at 1363 (no abuse of discretion where trial judge refuses to recount testimony of two witnesses on specific factual point). Thus, while the district court should, consistent with Rule 43(a), have informed counsel of the jury's request at the time it was

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[4]We thus disagree with petitioner's characterization of this routine exercise of trial court discretion as "a summary deprivation of the defendant's right to have specific testimony re-read" (Pet. 10). Except perhaps in special circumstances (not presented here), the decision is simply one of trial governance, not of the defendant's "right."

first made, that it failed to do so here did not rise to the level of reversible error.

Petitioner's assertion (Pet. 9-10) of a conflict between the decision below and *Rogers* v. *United States, supra,* is, accordingly, unfounded. In *Rogers,* the district court responded to a jury note that "was tantamount to a request for further instructions" without complying with Fed. R. Crim. P. 43(a) (422 U.S. at 39). The court's response, moreover, was substantively incorrect and "fraught with potential prejudice" (*id.* at 41).[5] This Court thus concluded that "the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed," necessitated reversal of petitioner's conviction (*id.* at 40) Here, in contrast, the jury's request was not for additional instruction, but to be read untranscribed excerpts of the testimony of five witnesses. In denying the jury's request in the exercise of its discretion, the district court's response "was purely ministerial, advising the jury that no transcript was available." *United States* v. *Zielie,* 734 F.2d at 1460.[6]

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[5]In *Rogers,* the jury inquired whether the district court would "accept the Verdict — 'Guilty as charged with extreme mercy of the Court.' " The court, without first informing counsel, indicated that it would (422 U.S. at 36 (citation omitted)). This Court observed that not only was the trial court wrong to ignore Rule 43(a) when faced with a request for supplemental instruction, but "[a]t the very least, the [district] court should have reminded the jury that the recommendation would not be binding in any way. * * * In addition, the response should have included the admonition that the jury had no sentencing function * * *" (*id.* at 40).

[6]The appellate decisions petitioner contends (Pet. 10) are in conflict with the decision below are also inapplicable. *United States* v. *Zarintash,* 736 F.2d at 70, involved a jury request for the testimony of a single witness "which occupied a discrete [and short] portion" of an already existing transcript. In *United States* v. *Ronder,* 639 F.2d 931, 934 (2d Cir. 1981), and *United States* v. *Treatman,* 524 F.2d 320, 323 (8th Cir. 1975), as in *Rogers,* jury requests for supplemental instruction were answered without affording counsel the opportunity to comment or object. Finally, in *United States* v. *Rabb,* 453 F.2d 1012 (3d Cir.

The insubstantiality of petitioner's argument is brought home by the reaction of her defense counsel when informed — minutes later — of the jury's request and the court's response. Although the jury's verdict had not yet been rendered, counsel did not raise any objection either to the court's failure to inform petitioner when the incident occurred or to the court's response to the jury. Nor did petitioner raise the issue in post-trial motions, "although post-trial hearings may often resolve this sort of claim" (*United States* v. *Gagnon,* slip op. 6). This suggests strongly that petitioner and defense counsel at the time did not disagree with the trial court's disposition of the jury's request. Their "latter day protests of the District's Court's action with respect to [this] relatively minor incident" (*id.* at 7) should not be accorded much credence. Furthermore, petitioner's failure to object when informed of the incident provides an additional ground for affirmance of the judgment below. See *United States* v. *Young,* No. 83-469 (Feb. 20, 1985), slip op. 13 (in absence of a timely objection to preserve the error for appeal, the "dispositive issue" is not whether there was error, but whether it was "plain error"); *United States* v. *Gagnon,* slip op. 7 ("defendant or his counsel * * * may not claim [a Rule 43 right] for the first time on appeal from a sentence entered on a jury's verdict of 'guilty' ").[7]

1971), the trial court, instead of granting the jury's request to have certain testimony read verbatim, "read its summary of the testimony * * * and added that if the jury had a different recollection of the testimony they should use it to guide them" (*id.* at 1013). Thus, unlike the discretionary refusal at issue here, in *Rabb* the court's insistence on delivering its own summary "raise[d] the possibility that the jury [might have been] given an erroneous view of the testimony * * * (*id.* at 1015).

[7]We are mindful of the distinction between this case and *Gagnon*: in *Gagnon* the defendants were informed in advance of the judge's intentions to communicate in chambers with the juror, whereas here the judge's communications were revealed 40 minutes after they had taken

2. Petitioner also contends (Pet. 14-18), relying exclusively upon the panel decision in *United States* v. *Waterman, supra,* that the government's use of witnesses with whom it had entered into plea agreements violated her right to due process, requiring reversal of her conviction. The *Waterman* decision has since been vacated by the en banc court (732 F.2d at 1533) and therefore no longer stands as authority for petitioner's position. The rationale of the *Waterman* panel decision has also recently been rejected by the First Circuit in *United States* v. *Dailey,* No. 84-1578 (Apr. 5, 1985). There is not, therefore, even a colorable claim of a conflict in the circuits. Moreover, petitioner raised this issue for the first time in her supplemental brief in the court of appeals (Pet. App. A3). Having failed to preserve the issue for appeal, petitioner cannot prevail on it now — unless, as petitioner does not contend, the district court committed plain error. See *United States* v. *Young, supra.*

In any event, the court below did not reject the *Waterman* panel's holding as a matter of law, but simply pointed out that there is "no factual support in the record for the argument" (Pet. App. A3). That conclusion does not warrant this Court's attention, and is clearly correct.

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place. We therefore do not contend that petitioner waived her Rule 43 rights in the sense in which the defendants waived those rights in Gagnon. Nonetheless, this Court in *Gagnon* stressed (slip op. 5-6 (emphasis added)) that the *Gagnon* defendants

> neither then [when the incident occurred] *nor later in the course of the trial* asserted any Rule 43 rights they may have had to attend this conference. * * * No objections of any sort were lodged, *either before or after the conference.* Respondents did not even make any post-trial motions.

Nor did the *Gagnon* defendants lodge any objection to the action taken by the trial court as a result of the in chambers interview with the juror (*id.* at 2). The Court's strictures against these procedural derelictions in *Gagnon* apply equally to the instant case.

In *Waterman* as in this case, the conviction was based in large part on the testimony of the defendant's former confederates, which testimony was obtained as part of a plea agreement. There the resemblance stops. In *Waterman,* the panel's ruling was based upon a finding that the plea agreement was expressly "*contingent upon* the content and results of [the witness's] testimony" (732 F.2d at 1531 (emphasis in original)). The agreement, as interpreted by the trial court in *Waterman,* provided that if the witness's cooperation "led to further indictments" the government would recommend a reduction in sentence, but that if the testimony "did not lead to the indictment of other individuals" the government would not recommend any reduction in sentence (*id.* at 1530). It was on this interpretation of the agreement that the court of appeals panel concluded that the agreement was an "invitation to perjury" and a denial of due process (*id.* at 1531).

The agreement in this case is wholly unlike that described in *Waterman.* The agreement contained no contingency whatsoever; petitioner's co-conspirators were required to provide "truthful testimony" — nothing more. Their fate did not hinge upon whether their testimony tended to inculpate or exculpate petitioner, or upon what the outcome of petitioner's trial might be. Moreover, unlike in *Waterman,* where the court relied upon a conclusion that the government's sole witness significantly expanded his testimony after entry of the plea agreement (732 F.2d at 1532-1533),[8] there is no extrinsic reason to doubt the truthfulness of the testimony of the five government witnesses in this case. Accordingly, unless a plea bargain wherein the government

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[8]As we describe more fully in our brief in opposition to the petition in *Waterman* (No. 84-1235), the various factual suppositions on which the panel rested its ruling were largely unfounded. A copy of our *Waterman* brief has been provided to petitioner.

agrees to a more favorable disposition in return for cooperation or testimony is a violation per se — which not even the *Waterman* panel would hold (732 F.2d at 1531) — the conviction here should be sustained. See *United States* v. *Librach,* 536 F.2d 1228, 1229-1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976).

Petitioner insinuates (Pet. 17) that "[t]here is a substantial factual basis showing that further recommendations for lenient treatment were contingent on the Government's success with the Petitioner's indictment and prosecution" (Pet. 17). However, the sole factual support she offers (*ibid.*) is that co-conspirator Koon obtained "an even more favorable sentencing recommendation on the first day of the Petitioner's trial," thus in her view making it "evident to all five witnesses that 'rewards' for more lenient treatment might be forthcoming at or before their subsequent sentencing hearings if they would please the Government appropriately." Petitioner fails to mention, however, that Koon's recommended sentence was reduced because he had assisted the government as a confidential informant in an unrelated prosecution. See VIII R. 125-126, 149, 152; IX R. 7. Nor does she mention that none of the other four witnesses obtained similar reductions, despite her contention that such reductions were understood to follow in the event she were convicted (which, of course, she was).

The court of appeals, by its recognition that there is "no factual support in the record" for petitioner's claim (Pet. App. A3), rejected petitioner's one-sided view of the events in question. That analysis of the record does not require review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1985